

MAR 25 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL CARRILLO HERNANDEZ,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

Nos. 04-75541

05-73794

Agency No. A079-245-773

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted March 18, 2009**

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Joel Carrillo Hernandez, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's ("IJ") decision denying his motion to reopen removal

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

proceedings conducted in absentia. Our jurisdiction is governed by 8 U.S.C. § 1252. We grant the petition for review and remand for further proceedings. We dismiss consolidated case No. 05-73794.

At the time of its decision, the BIA did not have the benefit of *Perez v. Mukasey*, 516 F.3d 770 (9th Cir. 2008), which held that “a petitioner who arrives late for his immigration hearing, but while the IJ is still in the courtroom, has not failed to appear.” *Id.* at 774. We note that the record is unclear regarding whether the IJ was present in the courtroom after Carrillo Hernandez arrived. We therefore remand for the BIA to consider whether Petitioner failed to appear in light of *Perez*. If necessary, the BIA should also consider whether counsel Argumedo’s affidavit supports Carrillo Hernandez’s claim of exceptional circumstances. *See Lo v. Ashcroft*, 341 F.3d 934, 939 (9th Cir. 2003).

Because the Attorney General has represented that he “will allow [Carrillo Hernandez] to return to this country to participate in any future immigration proceedings,” if necessary, we dismiss case No. 05-73794.

No. 04-75541: PETITION FOR REVIEW GRANTED; REMANDED.

No. 05-73794: PETITION FOR REVIEW DISMISSED.